IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA LUGER, AND
WARRIOR WASH & EMPORIUM, LLC,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. 1:26-cv-0030

Judge Kaplan

DEFENDANT'S MOTION TO DISMISS

BRETT A. SHUMATE
Assistant Attorney General

PATRICIA M. McCARTHY
Director

ALBERT S. IAROSSI
Assistant Director

PATRICK S. ANGULO
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 507-6083
Patrick.S.Angulo@usdoj.gov

AMY KANIA
Attorney-Advisor
Office of the Solicitor
Department of the Interior
Northeast Region, Twin Cities

Of Counsel

March 10, 2025

Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Other Authorities

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

JOSHUA LUGER, AND WARRIOR WASH & EMPORIUM, LLC, *Plaintiffs*, v. THE UNITED STATES, *Defendant*.	Case No. 1:26-cv-0030 Judge Kaplan

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint filed by plaintiffs, Joshua Luger (Mr. Luger) and Warrior Wash & Emporium, LLC, for lack of jurisdiction and failure to state a claim.

Plaintiffs' single-count complaint alleges that officers with the Bureau of Indian Affairs (BIA) unconstitutionally seized their industrial hemp product in connection with a criminal investigation. Plaintiffs seek damages of $250,000 for the seizure of the property (valued at $29,788.98), and for other non-economic injuries including emotional distress, humiliation and harm to reputation.

Plaintiffs' complaint should be dismissed for several independent reasons. First, this Court lacks jurisdiction over plaintiffs' takings claim because the claim sounds in tort. Second, plaintiffs have failed to exhaust available remedies under Rule 41(g) of the Federal Rules of Criminal Procedure. Third, and in the event that this Court concludes that it has jurisdiction over any portion of this complaint, this Court should nonetheless dismiss the complaint for failure to state a claim. Because plaintiffs' property was seized pursuant to the Government's police power, rather than for a public use, plaintiffs cannot plausibly allege a takings claim.

STATEMENT OF THE CASE

I. Statement Of Facts[1]

Mr. Luger is a resident of Bismarck, North Dakota, and a member of the Standing Rock Sioux Tribe (SRST). *See* Compl. ¶ 1. Mr. Luger owns and operates several businesses within the Standing Rock Sioux Tribal Reservation. *Id.* ¶¶ 2, 8. Most relevant to this action, Mr. Luger operates Warrior Wash & Emporium, LLC (Warrior Wash), a car wash and convenience store. *Id.* ¶¶ 2, 8. Since approximately June 2022, Warrior Wash has sold industrial hemp products. Plaintiffs allege that these products are legal under the Agricultural Improvement Act of 2018, P.L. 115-334 (codified at 7 U.S.C. § 1621 *et seq.*) and Title 43 of the Standing Rock Tribal Code. *See id.* ¶ 9. Plaintiffs do not allege, however, that they are licensed under Title 43 by the Standing Rock Sioux Tribe – or any other regulatory authority – to conduct such sales. *See* Standing Rock Sioux Tribe Code of Justice, Title 43, Industrial Hemp Regulation, § 401(b) (Aug. 3, 2021) (requiring prospective sellers of industrial hemp to obtain a tribal industrial hemp license), *available at* https://www.standingrock.org/wp-content/uploads/2021/09/TitleXLIII IndustrialHempRegulationCode.pdf (last visited February 24, 2026).

[1] The following facts are taken from the allegations contained in plaintiffs' complaint, which, for the purposes of this motion, the Government accepts as true. *See Creative Mgmt. Servs., LLC v. United States*, 989 F.3d 955, 961 (Fed. Cir. 2021), *abrogated on other grounds by EGC Int'l Constructors, LLC v. Sec'y of Army*, 79 F.4th 1364 (Fed. Cir. 2023). The Court may also take "[j]udicial notice of public records . . . when considering a motion to dismiss." *Diversified Grp., Inc. v. United States*, 123 Fed. Cl. 442, 452 n.7 (2015), *aff'd*, 841 F.3d 975 (Fed. Cir. 2016) (citing *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999)).

On December 21, 2023, BIA law enforcement, led by Lt. Murray Spence, executed a search warrant at Warrior Wash and seized $29,778.98 worth of alleged industrial hemp products. *Id.* ¶ 12. Following this search and seizure, a complaint was lodged against Mr. Luger in SRST criminal court for the sale of illegal drugs. *Id.* ¶ 13. In May 2024, the SRST special prosecutor filed a motion to dismiss the sole charge against Mr. Luger. *Id.* ¶ 16. Plaintiffs do not allege that this motion was granted by the court. The SRST special prosecutor's motion was based on a certificate of analysis from KCA Laboratories.[2] *Id.* ¶ 16; *see also* Compl. Ex. 3 (ECF No. 1-1) at 6.[3] This report indicates that the tested product contains 0.240 percent delta-9 (Δ9) tetrahydrocannabinol (THC) and 26 percent Δ9 tetrahydrocannabinolic acid (THCA). *See* Compl. Ex. 3 (ECF No. 1-1) at 7. The second to last line item of the report indicates that the "Total-Δ9-THC" content is 23.013 percent. *See id.* To calculate this figure, the lab report provides the following formula toward the bottom of the page: "Δ9-THCA*0.877 + Δ9-THC." *Id.*

When BIA declined to return the seized products, Mr. Luger filed a motion to return the property in SRST criminal court. *Id.* ¶ 21. The court dismissed Mr. Luger's motion for lack of jurisdiction, holding that the tribal court lacked jurisdiction to order the Federal government to return the property. *Id.* As of the date of this filing, BIA's investigation related to the product has closed and BIA intends to dispose of the seized products as contraband in accordance with

[2] For purposes of this motion, defendant accepts as true the results of this report and plaintiffs' allegations involving this report. *See Creative Mgmt. Servs., LLC*, 989 F.3d at 961.

[3] Because the documents attached to the complaint (ECF No. 1-1) do not use consistent page numbers, our citations to these attachments use the CM/ECF system pagination, which appears on the header of each page.

21 U.S.C. § 881(f), and the Department of the Interior, Department Manual Part 446, Chapter 7 (Jan. 13, 2021).

II. Procedural History

On August 7, 2025, plaintiffs filed a complaint in the United States District Court for the District of North Dakota. *See Luger et al. v. United States*, Case No. 25-cv-193 (D.N.D. Aug. 7, 2025), ECF No. 1 (*Luger I*). That three-count complaint alleged that the seizure of plaintiffs' property constitutes an unconstitutional taking. *See id.* ¶¶ 34–39. Plaintiffs further alleged malicious prosecution and abuse of process. *Id.* ¶¶ 41–48*,* 50–56.

On August 12, 2025, plaintiffs filed a complaint in the United States Court of Federal Claims. *Luger et al. v. United States*, Case No. 25-cv-01345 (Ct. Cl. Aug. 12, 2025), ECF No. 1 (*Luger II*). That complaint reproduced many of the same allegations from the complaint filed in the district court. The only substantive difference appeared to be the removal of counts two and three (malicious prosecution and abuse of process). On November 4, 2025, this Court dismissed *Luger II* pursuant to 28 U.S.C. § 1500. *See Luger II*, 178 Fed. Cl. 726 (Nov. 4, 2025). The following week, plaintiffs filed a notice of voluntary dismissal in district court. *See Luger I*, ECF No. 14 (Nov. 10, 2025). The district court adopted the notice and dismissed the matter without prejudice. *Luger I*, ECF No. 15 (Nov. 15, 2025).

On January 9, 2026, plaintiffs filed the instant complaint in this Court. This single-count complaint alleges an unconstitutional taking of property and reproduces nearly all of the allegations from *Luger II*. The differences – which are minor – include the removal of the individual defendants and a reduction in the alleged damages of lost profits (previously $130,000 but now $100,000). Once again, plaintiffs allege that the BIA and its officers failed to follow internal procedures requiring the testing of the seized product. *See* Compl. ¶ 15. Plaintiffs again allege economic and noneconomic damages, including lost profits, emotional distress, humiliation, and harm to reputation. *Id.* ¶ 27. Plaintiffs seek an award of money damages "in excess of $250,000.00." *See* Compl. p. 7 (Prayer).

ARGUMENT

This Court should dismiss plaintiffs' complaint for lack of jurisdiction. This Court does not have jurisdiction over allegations that sound in tort, which pervade the entirety of the complaint. Furthermore, plaintiffs' failure to exhaust also results in this Court's lack of jurisdiction. Even if this Court has jurisdiction over some aspect of the complaint, plaintiffs nonetheless fail to state a claim upon which relief can be granted. Because plaintiffs' property was seized pursuant to the Government's police power, rather than for a public use, plaintiffs cannot plausibly allege the elements of a takings claim.

I. This Court Lacks Jurisdiction Over Plaintiffs' Complaint

A. Standard of Review

Jurisdiction is a threshold matter and, "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (internal quotation marks and citation omitted), *abrogated on other grounds by CACI, Inc-Fed. v. United States*, 67 F.4th 1145 (Fed. Cir. 2023). Under the Constitution, Congress is authorized to define the jurisdiction of the lower Federal courts and, once it has done so, limits on that jurisdiction may not be disregarded. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). The Court of Federal Claims is a court of limited jurisdiction. *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 428, *aff'd*, 758 F.2d 665 (Fed. Cir. 1984). This Court possesses jurisdiction only to entertain claims where the United States has expressly waived its sovereign immunity from suit. *United States v. Testan*, 424 U.S. 392, 399 (1976); *Booth v. United States*, 990 F.2d 617, 619 (Fed. Cir. 1993).

"A motion to dismiss under RCFC 12(b)(1) will be granted if the plaintiff fails to assert appropriate subject-matter jurisdiction, as 'subject matter jurisdiction is strictly construed.'" *Telemaque v. United States*, 82 Fed. Cl. 624, 626 (2008) (quoting *Leonardo v. United States*, 55 Fed. Cl. 344, 346 (2003)). The plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011).

B. The Tucker Act Prohibits This Court From Entertaining Plaintiffs' Tort Claims

The core allegations of plaintiffs' complaint – that Government officials unlawfully seized and possess plaintiffs' property – sound in tort. The Court therefore lacks jurisdiction to consider these claims. *Moore v. United States*, No. 2016-2092, 2017 WL 1839186, at *1 (Fed. Cir. May 4, 2017) ("The Claims Court is a court of limited jurisdiction and lacks jurisdiction to hear claims sounding in tort.") (citing 28 U.S.C. § 1491(a)(1)).

The Tucker Act empowers the Court of Federal Claims to hear claims asserted under the Just Compensation Clause of the Fifth Amendment. *See* 28 U.S.C. § 1491 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . ."). However, for the Court to possess jurisdiction over a takings claim, the "claimant must concede the validity of the government action which is the basis of the taking claim." *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802-03 (Fed. Cir. 1993); *see also Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1329-32 (Fed. Cir. 2006) (holding that in a takings case, the court assumes that the underlying action was lawful and decides only whether the governmental action in question constituted a taking for which compensation must be paid). Moreover, unauthorized acts by Federal officials constitute torts, not takings. *See Smithson v. United States*, 847 F.2d 791, 794

(Fed. Cir. 1988); *see also Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("A compensable taking arises only if the government action in question is authorized.").

In this case, plaintiffs repeatedly characterize the Government's actions as "unlawful," "unconstitutional," or contrary to agency policy. Compl. ¶¶ 5, 7, 15, 29, 31, 33, 35; *see also id.* ¶ 7 (referencing property "being wrongfully taken"). Because plaintiffs contest the validity of Government action, this Court lacks jurisdiction over plaintiffs' takings claim. *See Tabb Lakes*, 10 F.3d at 801-03 ("[C]laimant must concede the validity of the government action which is the basis of the takings claim."); *see also Jackson v. United States*, 143 Fed. Cl. 242, 247 (2019); *Tindall v. United States*, 167 Fed. Cl. 440, 446 (2023), *aff'd*, No. 2024-1143, 2024 WL 960452 (Fed. Cir. Mar. 6, 2024) (dismissing complaint where "Mr. Tindall's Complaint explicitly alleges an 'unconstitutional' taking of his property several times"); *Seay v. United States*, 61 Fed. Cl. 32, 36 (2004) (explaining that where a plaintiff claims the Government's unauthorized conducted caused damage to personal property, plaintiff's claim sounds in tort); *Bd. Mach., Inc. v. United States*, 49 Fed. Cl. 325, 332 n.9 (2001) (noting that "claims based upon unauthorized acts of Government officials sound in tort") (citation and internal quotation omitted).

The more specific allegations involving the misconduct of Government officials also "makes clear that the true nature of [this] action is one for damages based on unlawful conduct by the government, not on a taking of private property for public use." *Acadia Tech.*, 458 F.3d at 1333. The complaint alleges that the actions of Officers Spence and Bad Hand violated BIA policies and that "no trained law enforcement officer would have or should have believed there was sufficient probable cause to seize the industrial hemp product." Compl. ¶¶ 15, 30. Plaintiffs further allege that the officers "had a duty to return the property" but have failed to do so. *Id.*

¶ 31. These allegations – involving duty, standard of reasonable care, and breach – clearly show that plaintiffs' complaint sounds in tort. And despite removing the two counts alleging "malicious prosecution" and "abuse of process" (alleged in the district court litigation) this Court must look at "the true nature of the action." *Livingston v. Derwinski*, 959 F.2d 224, 225 (Fed. Cir. 1992). The true nature of this action remains the allegation of unlawful seizure, malicious prosecution, abuse of process, and other tortious Government misconduct. *See* Compl. ¶ 14 (alleging "law-fare"); *id.* ¶ 23 (alleging "weaponization of the Tribal criminal justice system"); *id.* ¶¶ 27 (alleging damages caused by "enduring [the] Tribal Criminal Case"); *id.* ¶ 33 (alleging "abuse of authority"). Accordingly, this Court lacks jurisdiction over plaintiffs' complaint. *See* *Livingston v. United States*, 167 Fed. Cl. 604, 639 (2023) ("Regardless of plaintiff's minor changes to his most recently filed complaint, the United States Court of Federal Claims lacks subject matter jurisdiction to review what is, in essence, plaintiff's tort claim.").

Plaintiffs' claim for damages puts the issue beyond all doubt. Plaintiffs allege that the value of the unlawfully seized property is $29,778.98. Compl. ¶ 32. Rather than addressing what "just compensation" is owed for the alleged taking of this property, plaintiffs seek "[a] total award of money damages in excess of $250,000.00[.]" Compl. p. 5. The $220,221.02 difference between the value of the seized property and the amount sought is explained, at least in part, by other "damages, economic and non-economic" suffered by the plaintiffs, including "emotional distress, humiliation, harm to reputation, worry, anxiety, [and] sleepless nights[.]" Compl. ¶ 27. It is well-settled that the Court lacks jurisdiction to award damages for pain, suffering, and mental anguish. *See, e.g.*, *Fernandez de Iglesias v. United States*, 96 Fed. Cl. 352, 363 (2010), *aff'd*, 552 F. App'x 973 (Fed. Cir. 2013) ("This court has no general jurisdiction to award damages for emotional distress, pain and suffering, or mental anguish."); *Hall v. United States*, 69 Fed. Cl. 51, 57 (2005) ("In addition, the court does not have jurisdiction to award damages for emotional distress and pain and suffering."). The damages sought by plaintiffs plainly show that this Court lacks jurisdiction to hear their complaint which sounds in tort.

C. Plaintiffs Have Failed to Exhaust

Even if plaintiffs' complaint did not sound in tort – although it clearly does – this Court nonetheless lacks jurisdiction over this complaint because plaintiffs have failed to properly exhaust their remedies. The Supreme Court has described the Tucker Act as serving a "gap-filling role" by allowing "for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *United States v. Bormes*, 568 U.S. 6, 12–13 (2012) (footnote omitted). In accordance with that characterization, the Court has held that the Tucker Act does not apply in various circumstances in which Congress has provided "a precisely drawn, detailed statute" that "contains its own judicial remedies." *Id.* at 12 (internal quotation marks omitted). Where it has found those circumstances, the Court has held that the "specific remedial scheme establishes the exclusive framework for the liability Congress created under the statute" and "displace[s]" the Tucker Act. *Id.*; *see also Horne v. Dep't of Agric.*, 569 U.S. 513, 527-28 (2013) (recognizing that, where a comprehensive remedial scheme exists, Congress may revoke Tucker Act jurisdiction for a takings claim).

The Federal Circuit has recently reaffirmed the position that a claimant cannot bring a takings claim until remedies are exhausted. *See Jenkins v. United States*, 71 F.4th 1367, 1374 (Fed. Cir. 2023) ("There is no takings liability for government retention of property if the party whose property was seized fails to and is required to exhaust remedies provided by the federal government."). In this case, those remedies are provided by Rule 41(g) of the Federal Rules of Criminal Procedure. Rule 41(g) states that "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return" and "[t]he court must receive evidence on any factual issue necessary to decide the motion." Fed. R. Crim. P. 41(g). To succeed on a Rule 41(g) motion, plaintiffs must show that they are lawfully entitled to possess the seized property and that the United States has or had the property. *United States v. Howard*, 973 F.3d 892, 894 (8th Cir. 2020). If a factual dispute exists "as to who has custody of the property or who is entitled to its possession arises, 'the court must hold a hearing to determine those issues.'" *Id.* (quoting *United States v. Timley*, 443 F.3d 615, 625 (8th Cir. 2006)). The court must hold an evidentiary hearing "on any disputed issue of fact necessary to the resolution of the motion." *United States v. Chambers*, 192 F.3d 374, 377–78 (3d Cir. 1999); *see Pitts v. United States*, 228 F. Supp. 3d 412, 417–20 (E.D. Pa. 2017) (providing an overview of Rule 41 proceedings).

The Federal Circuit in *Jenkins* – an appeal from the United States District Court for the District of North Dakota – observed that there was an open question "whether the Rule 41(g) remedy is a mandatory remedy."[4] 71 F.4th at 1375. This Court, however, has treated the Rule 41(g) remedy as a jurisdictional prerequisite. *See, e.g.*, *Garcia Carranza v. United States*, 67 Fed. Cl. 106, 111 (2006) ("In the context of seeking return of property seized at arrest, however, Plaintiff first must file a motion for return of property pursuant to Fed. R. Crim. P. 41(g) before invoking the jurisdiction of the United States Court of Federal Claims to assert a takings claim."); *see also Carter v. United States*, 62 Fed. Cl. 365, 369 (2004) ("A party may have a valid takings claim in the event his property was seized by the Government as part of a criminal

[4] *Jenkins* had no occasion to consider this issue because the claimant had plausibly "contend[ed] that, as a practical matter, there was no Rule 41(g) remedy available to him because the government never notified him that the cars were no longer needed for the criminal investigation or that the cars were available for pickup." 71 F.4th at 1375.

investigation and never forfeited or returned; however, this claim for just compensation is not ripe until the aggrieved party has availed himself of the procedures set forth in Rule 41(g) and obtained a final decision from the district court that entitles him to assert a takings claim.”); *Duszak v. United States*, 58 Fed. Cl. 518, 521 (2003) (“Until plaintiff has availed herself of [Federal Rule of Criminal Procedure 41(g)] and obtained a final decision . . . the taking claim filed in this court is not ripe for decision.”).

Here, plaintiffs do not allege that they have filed a Rule 41(g) motion, much less secured a final decision from the district court that may support a later claim under the Tucker Act.[5] Although plaintiffs’ claims may have remedy elsewhere, this Court presently lacks jurisdiction over these claims. *See Rhaburn v. United States*, 390 F. App’x 987, 988–89 (Fed. Cir. 2010) (unpublished) (“The Court of Federal Claims recognized that the allegations as pled may have remedy elsewhere, for ‘individuals whose property has been seized by the government may pursue a due process remedy pursuant to Federal Rule of Criminal Procedure 41(g).’”); *Phang v. United States*, 87 Fed. Cl. 321, 327–28 (2009), *aff’d sub nom*, *Phu Mang Phang v. United States*, 388 F. App’x 961 (Fed. Cir. 2010) (“If Mr. Phang’s property was never forfeited at all, then, as noted by the defendant, Rule 41(g) of the Federal Rules of Criminal Procedure provides Mr. Phang with the appropriate remedy.”); *see also Bacchus v. United States*, No. 12-887C, 2013 WL 1831582, at *2 n.2 (Fed. Cl. May 1, 2013) (“Mr. Bacchus’ rights are limited to those provided for under Rule 41(g) of the Federal Rules of Criminal Procedure.”) (internal citation omitted).

[5] Plaintiffs have alleged that they have filed a motion to return the seized property in tribal court. *See* Compl. ¶ 21. But as the order dismissing that motion explained, the tribal court lacks jurisdiction over the Federal government, which possesses the property. *Id.* Plaintiffs do not allege that they have filed a Rule 41(g) in Federal district court, which would have jurisdiction over these Federal entities.

II. Plaintiffs' Complaint Fails To State A Claim

Even if the Court finds that this complaint does not sound in tort and that plaintiffs' failure to exhaust is not a jurisdictional bar, plaintiffs nonetheless fail to state a claim upon which relief can be granted. Plaintiffs allege that the Government has seized hemp product as evidence in a criminal proceeding. *See* Compl. ¶¶ 12, 13, 15. As we explain below, it is well-settled that the Government's exercise of its police power is not a "public use" and cannot form the basis for a takings claim.

A. Legal Standards

"A complaint must be dismissed under [RCFC] 12(b)(6) when the facts asserted do not give rise to a legal remedy, or do not elevate a claim for relief to the realm of plausibility." *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (citation omitted). "'[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Murdock v. United States*, 103 Fed. Cl. 389, 394 (2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Determining whether a complaint states a plausible claim for relief will . . . be a context–specific task." *Iqbal*, 556 U.S. at 679.

"Although [the Court] primarily consider[s] the allegations in a complaint," it is "not limited to the four corners of the complaint." *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (quoting 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004) (internal quote marks omitted)). Rather, the Court may also consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021) (citation & internal quote marks omitted).

B. Plaintiffs' Property Was Seized Pursuant To The Government's Police Power, Rather Than For A Public Use

"A claimant under the Takings Clause must show that the government, by some specific action, took a private property interest for a public use without just compensation." *Adams v. United States*, 391 F.3d 1212, 1218 (Fed. Cir. 2004). The Takings Clause of the Fifth Amendment "does not entitle all aggrieved owners to recompense, only those whose property has been 'taken for a public use.'" *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2008). Even "[w]hen private property is damaged incident to the exercise of the police power, such damage is not a taking for the public use, because the property has not been altered or turned over for public benefit." *Bachmann v. United States*, 134 Fed. Cl. 694, 696 (2017). "Instead, both the owner of the property and the public can be said to be benefited by the enforcement of criminal laws and cessation of the criminal activity." *Id.* (citing *Nat'l Bd. Of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92–93 (1969)).

The "precedent" of the Federal Circuit "is clear: 'Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause.'" *Kam-Almaz v. United States*, 682 F.3d 1364, 1371 (Fed. Cir. 2012) (quoting *AmeriSource*, 525 F.3d at 1153); *see also McCutchen v. United States*, 145 Fed. Cl. 42, 51–52 (2019), *aff'd*, 14 F.4th 1355 (Fed. Cir. 2021). "When property has been seized pursuant to the criminal laws or subjected to *in rem* forfeiture proceedings, such deprivations are not 'takings' for which the owner is entitled to compensation." *Acadia Tech., Inc.*, 458 F.3d at 1331 (citations omitted). In other words, the seizure of property is *not* the "sort of 'public use' of private property for which the Takings Clause of the Fifth Amendment requires compensation." *Id.*

Moreover, "[t]he same rule applies even if the property is seized as evidence in a criminal investigation or as the suspected instrumentality of a crime, but is ultimately returned to the owner either because the government does not pursue forfeiture proceedings or because the owner prevails in a forfeiture action." *Id.* at 1331-32 (citations omitted); *see also Bachmann*, 134 Fed. Cl. at 697 (holding that the U.S. Marshals Service's damage to a rental property "caused in the course of arresting a fugitive on plaintiffs' property was not a taking for public use, but rather it was an exercise of the police power of the United States."); *Ramos v. United States*, 112 Fed. Cl. 79, 86 (2013) (granting motion to dismiss "[b]ecause the property confiscated from Mr. Ramos was seized pursuant to lawful criminal proceedings and thus was not taken for public use, its loss, under the precedent of this circuit, cannot give rise to a takings claim."). Once property is seized in a criminal matter, the "owner of the property has a due process right to have the government either return the property or initiate forfeiture proceedings without unreasonable delay." *Acadia Tech., Inc.*, 458 F.3d at 1333-34. If there is a delay in the Government initiating forfeiture proceedings, then the owner may institute an action in Federal *district court*. *Id.* (citing *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 566 (1983)).

Here, plaintiffs concede that the product was seized as evidence in a criminal investigation. *See* Compl. ¶¶ 14, 15, 16. *Acadia* forecloses plaintiffs' claim that this property was taken for a public use. *See* 458 F.3d at 1331. Plaintiffs' related allegation that the was legally possessed and that the criminal charge was ultimately dismissed is irrelevant. That is because "the innocence of the property owner [does not] convert what is otherwise the proper, non-compensable exercise of the police power into a Fifth Amendment taking, even when that property is subject to forfeiture." *Bachmann*, 134 Fed. Cl. at 698 (citing *Calero–Toledo v.*

Pearson Yacht Leasing Co., 416 U.S. 663, 680–85 (1974) (holding that there was no taking where a yacht that the owner had leased was forfeited due to the discovery of marijuana on board, despite the owner of the yacht having "no knowledge that its property was being used in connection with or in violation of" the law)).

Plaintiffs' allegation that the property "had become worthless" does not alter this analysis. In *AmeriSource Corp. v. United States*, the Government confiscated pharmaceutical drugs and retained them until their expiration date had expired. 525 F.3d 1149, 1153-54 (Fed. Cir. 2008). The Federal Circuit held that the Government's action did not constitute a taking, despite the fact that it had wiped out the property's value, because the property was taken in connection with the Government's exercise of its police power. *Id.* The same holds true here.

Plaintiffs' allegations involving defendant's continued possession of the property similarly fail to state a takings claim. The Circuit has specified that "the government's seizure *and retention* of the property d[oes] not constitute a taking." *Acadia*, 458 F.3d at 1332 (citing *United States v. One 1979 Cadillac Coupe De Ville*, 833 F.2d 994, 1000-01 (Fed. Cir. 1987) (emphasis added)). More recently, the Federal Circuit has stated that, "[e]ven when the initial seizure and retention of property is properly done pursuant to the police power, the police power does not insulate the government from liability for a taking if the property is not returned after the government interest in retaining the property ceases." *Jenkins*, 71 F.4th at 1373-74.

In this case, plaintiffs do not allege that that the Government's interest in retaining the property has ceased. *See generally* Compl. Nor can they. Laboratory testing reports provided by plaintiff indicate that the Delta-9 THC content of the tested items is 23.01 percent. *See* Compl. Ex. 3 (ECF No. 1-1) at 7. Under the Agricultural Improvement Act of 2018, total delta-9 THC concentration can be no more than 0.3 percent on a dry weight basis. 7 U.S.C. § 1639o(1);

see also 21 U.S.C. § 802(16) (definition of marijuana under the Controlled Substances Act and excluding hemp, as defined in 7 U.S.C. § 1639o). The delta-9 THC concentration of the seized product is more than 75 times the legal limit. *See* Compl. Ex. 3 (ECF No. 1-1) at 7. The seized product is therefore contraband subject to Controlled Substances Act, 21 U.S.C. § 802(16), which makes its possession a criminal offense.[6] Because the seizure and retention of this contraband is an exercise of the Government's police power, there has been no taking within the meaning of the Fifth Amendment. *See McCutchen*, 145 Fed. Cl. at 52 (2019).

C. Plaintiffs Fail To State A Claim For Any Damages Beyond "Just Compensation"

Even if plaintiffs have alleged property taken for "public use," they have nonetheless failed to state a claim for damages beyond "just compensation." The Fifth Amendment provides the right to just compensation for property taken, not "damages" that are the result from the Government's action. *See Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1581 (Fed. Cir. 1990) ("It is a well settled principle of Fifth Amendment taking law . . . that the measure of just compensation is the fair value of what was taken, and not the consequential damages the owner suffers as a result of the taking."); *see also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (just compensation is "the fair market value of the property on the date it is appropriated" and "[u]nder this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking" (internal citations omitted)). Accordingly, plaintiff has failed to state a claim for damages related to "lost profit[s], lost

[6] It is unclear why the SRST tribal prosecutor moved to dismiss the criminal charges against Mr. Luger. *See* Compl. ¶ 16. However, the SRST tribal prosecutor's motion is not relevant to the Government's seizure and possession of the product, which is contraband. If Mr. Luger wished to challenge the Government's possession of the contraband, he could have filed a motion under Rule 41(g) of the Federal Rules of Criminal Procedure in Federal district court.

productivity," "lost earnings," or "lost product/inventory."[7] Compl. ¶¶ 13, 33. Plaintiffs allege that the value of the sized property "was approximately $29,778.98" at the time of seizure. Compl. ¶ 12. Even if plaintiffs have alleged property taken for "public use," their takings claim is limited to $29,778.98, which plaintiffs themselves allege was the market value of the property when that property was seized.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the complaint for lack of subject matter jurisdiction, or, in the alternative, for failure to state a claim upon which relief can be granted.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

PATRICIA M. McCARTHY
Director

ALBERT S. IAROSSI
Assistant Director

/s/ Patrick S. Angulo
PATRICK S. ANGULO
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 507-6083
Patrick.S.Angulo@usdoj.gov

Attorneys for Defendant

AMY KANIA
Attorney-Advisor
Office of the Solicitor
Department of the Interior
Northeast Region, Twin Cities

Of Counsel

March 10, 2025

[7] As discussed, this Court lacks jurisdiction over plaintiffs' claim for damages related to emotional distress, humiliation, and harm to reputation. *See* Compl. ¶ 27.